No. 89-1806

IN THE

Supreme Court of the United States

October Term, 1989

UNITED STATES ARMY, *et al.*,

Petitioners,

v.

SERGEANT PERRY J. WATKINS,

Respondent.

On Petition For Writ of Certiorari
To The United States Court of Appeals
For The Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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July 10, 1990

ABCD Legal Printers, Seattle, WA

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Sergeant Perry J. Watkins urges this Court to deny the United States Army's Petition for a Writ of Certiorari to review the *en banc* judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion issued below is reported as *Watkins v. United States Army*, 875 F.2d 699 (9th Cir. 1989) (*en banc*) (*Watkins III*). The prior panel decision which was withdrawn by *Watkins III* is reported as *Watkins v. United States*, 847 F.2d 1329 (9th Cir. 1988) (*Watkins II*). Another prior panel decision of the Ninth Circuit which was overruled by *Watkins III* is reported as *Watkins v. United States Army*, 721 F.2d 687 (9th Cir. 1983) (*Watkins I*).

The first opinion of the District Court is reported as *Watkins v. United States Army*, 541 F. Supp. 249 (W.D. Wash. 1982). The second opinion of the District Court, which was reinstated by the *en banc* decision in *Watkins III*, is reported as *Watkins v. United States Army*, 551 F. Supp. 212 (W.D. Wash. 1982). The third opinion of the District Court (Appendix 174a-178a), issued on November 21, 1984 is not reported.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. Section 1254(1). Watkins was granted a thirty day extension of time to July 18, 1990, for the filing of this brief in opposition to certiorari.

QUESTIONS PRESENTED BY PETITIONER

1. Whether the federal government may ever be estopped from applying one of its valid regulations.

2. Whether the United States Army may be estopped from applying a valid regulation regarding the minimum qualifications of service members.

3. Whether the Army in this case was guilty of the type of affirmative misconduct that may give rise to estoppel.

STATEMENT OF THE CASE

On August 27, 1967 Watkins reported to an Army facility for his preinduction physical examination. On a report of medical history Watkins checked the box "Yes" indicating that he then had homosexual tendencies. *Watkins III*, at 701. A psychiatrist interviewed Watkins and found him "qualified for admission" notwithstanding his candid acknowledgment of homosexuality. *Id.* Following induction and boot camp training Watkins served in the Army in both the United States

and Korea. *Id.* While at Fort Belvoir, Virginia in November of 1968, Watkins again candidly stated to an Army Criminal Investigation Division agent that he had been a homosexual since age 13. *Id.*

Watkins received an honorable discharge from the Army on May 8, 1970, at the conclusion of his tour of duty. *Id.* at 702. At that time his reenlistment eligibility code was listed as unknown. *Id.* In May 1971 Watkins requested correction of his reenlistment designation in his release papers, and on June 3, 1971 the Army notified him that his reenlistment code had been corrected to category 1, "eligible for reentry on active duty." *Id.*

On June 18, 1971, Watkins reenlisted for a period of three years. *Id.* In January of 1972, Watkins was denied a SECRET level security clearance based on his November 1968 declaration of homosexuality contained in his military intelligence file. *Id.*

Following another honorable discharge on March 21, 1974, Watkins reenlisted for a six year term and was subsequently assigned to Korea as a company clerk. *Id.* In October 1975 Watkins' commander initiated administrative discharge proceedings against Watkins for unsuitability due to homosexuality pursuant to AR 635-200, Chapter 13. *Id.* On October 14, 1975, a four member board convened at Camp Mercer, South Korea and heard testimony indicating that Watkins was homosexual. *Id.* Captain Albert J. Bast III, Watkins' commanding officer, testifed that when asked, Watkins acknowledged being a homosexual. Bast further testified that Watkins was "the best [company] clerk I have known," and that his homosexuality did not affect the company. *Id.* First Sergeant Owen Johnson testified that everyone in the company knew that Watkins was homosexual and that his homosexuality had not caused any problems or elicited any complaints. *Id.* The board made the following unanimous finding: "SP5 Perry J.

Watkins is suitable for retention in the military service." *Id.* The Secretary of the Army adopted the board's recommendation and ordered that Watkins be retained in the Army.

Following a tour of duty in the United States, Watkins was reassigned to Germany where he served as a clerk and personnel specialist with the 5th United States Army Artillery Group. In November 1977 the commander of the 5th USAAG granted Watkins a security clearance for information classified as SECRET. *Id.* Watkins then applied for a position in the Nuclear Surety Personnel Reliability Program, which required him to hold a SECRET security clearance and to pass a background investigation check. Watkins was initially told that because his medical records disclosed that he had homosexual tendencies, he was not eligible for a position in the program. *Id.* Watkins appealed, and in support of his appeal, his commanding officer, Captain Dale E. Pastian wrote that Watkins should be admitted to the program because of his "outstanding professional aptitude, integrity, and suitability for assignment" in the program. *Id.* Examining physician Lieutenant Colonel J.C. De Tata, M.D., concluded that Watkins' homosexuality appeared to cause no problems with his work and noted that Watkins had already been through a Chapter 13 board "with positive results." *Id.* The decision to deny Watkins eligibility for the Nuclear Surety Program was reversed and Watkins was accepted into that program in July 1978. *Id.*

On October 26, 1979 Watkins reenlisted for another three year term. *Id.* Two months later, the commander of the U.S. Army Personnel Clearance Facility in Fort Meade, Maryland, advised Watkins by letter that the Army intended to revoke his security clearance. *Id.* The letter stated that the revocation was being sought "because during an interview on March 15, 1979, you stated that you have been a homosexual for the past 15 to 20 years." *Id.* Watkins submitted a rebuttal letter in May of 1980, in which he acknowledged making that statement. The commander of the Personnel Clearance Facility

revoked Watkins' security clearance by letter dated July 10, 1980. *Id.*

In February 1981 Watkins appealed the security clearance revocation to the Office of the Assistant Chief of Staff for Intelligence. On August 31, 1981 Watkins filed suit against the Army, challenging the revocation of his security clearance. *Id.* at 703, n.3. Rather than file an answer to Watkins' complaint, the Army commenced an administrative discharge proceeding against Watkins at Fort Lewis, Washington, seeking to discharge Watkins from the service on grounds of homosexuality. *Id.* at 702-03.

On October 13, 1981 Watkins filed an amended complaint which sought, in addition to reinstatement of his security clearance, an injunction prohibiting the Army from discharging him on grounds of homosexualtiy. *Id.* at 703, n.3. An administrative discharge proceeding was held at Fort Lewis. A three member board unanimously rejected the Army's contention that Watkins had committeed homosexual acts. *Id.* at 703. By a 2 to 1 majority the Board concluded that Watkins should be given an honorable discharge from the Army on grounds of homosexuality. The dissenting member of the Board concluded that AR 635-200 was not intended to be applied to inactive homosexuals, and recommended that Watkins be retained in the service. The commanding officer of Fort Lewis accepted the majority's recommendation and approved Watkins' separation from the Army. *Id.* at 703, n.2.

The District Court, however, ruled that the Army's administrative discharge double jeopardy regulation precluded the Army from discharging Watkins on grounds of homosexuality, because the Army had already conducted one administrative discharge proceeding in 1975 and had decided, at that time, to retain Watkins notwithstanding his homosexuality. *Watkins v. United States Army*, 541 F.Supp. 249 (W.D. Wash. 1982). The Army did not appeal this decision. Instead, before the

District Court had even ruled on the discharge issue, counsel for the Army declared that if the Army were enjoined from discharging Watkins, it would simply refuse to reenlist Watkins when his then current term of enlistment expired in October of 1982. *Watkins III*, at 703. The District Court then issued its second decision, ruling that the Army was estopped from denying reenlistment to Watkins on the ground that he was a homosexual. *Watkins v. United States Army*, 551 F.Supp. 212 (W.D. Wash. 1982).

The District Court made a number of factual findings in support of her legal conclusion that the Army was estopped from denying Watkins' reenlistment. First the District Court found that the Army was aware that Watkins was a homosexual, rejecting the Army's contention that the personnel responsible for enlistment and reenlistment did not know of his homosexuality as "patently absurd." [1]

Second, the District Court found that Watkins' reliance on the Army's assurance that his homosexuality would not be a bar to his military career, was reasonable. *Id.* at 222. Recognizing that Watkins "declared his homosexuality to the Army from the very beginning," the District Court noted that the Army's decisions to permit him to reenlist three times, to retain him in the service following a Chapter 13 administrative discharge board proceeding, to grant him a SECRET security clearance and admit him to a position in a Nuclear Surety Program at a NATO nuclear weapons site, were not casual decisions. *Id.* The District Court concluded:

> On each of many occasions the Army told [Watkins] his homosexuality was *not* disqualifying . . . [Watkins] had a

[1] "For the Army to acknowledge that it is aware of plaintiff's homosexuality when it comes to conducting criminal investigations, holding discharge proceedings, and revoking security clearances, but maintain that it is ignorant when four enlistments are at issue, suggests bad faith." 551 F. Supp. at 220.

> right to think he could make the Army his career because the Army told him so... Taken together, over a career spanning more than 14 years, [the Army's] acts amounted to a policy of ignoring this servicemember's homosexuality.

Watkins v. United States Army, 551 F. Supp. at 222 (emphasis in original).

Further, the District Court found as fact that Watkins was not aware of the fact that his homosexuality was a nonwaivable disqualification for reenlistment:

> Any doubts [Watkins] may have had as to whether the Army would permit him to reenlist were dispelled in 1970, when the Army "corrected" his reenlistment code and signed a three year contract with him. Had [Watkins] known the true facts, it is highly unlikely that he would have invested twelve additional years in the Army.

Watkins v. United States Army, 551 F. Supp. at 222.

Finally, the District Court found as fact that if the Army were permitted to deny Watkins reenlistment, Watkins would suffer serious injury.[2] And yet if the Army were forbidden to deny his reenlistment, the Court found that not only would

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[2] "Tied up in litigation, less than six years from retirement, having invested a total of more than 14 years in the Army, it is not difficult to see that plaintiff has relied to his injury on the many 'green lights' he received from Army representatives. Plaintiff developed skills necessary for military employment and refrained from developing skills suitable for civilian jobs. He worked more than 14 years toward a retirement benefit that he could have sought elsewhere. Had the Army refused plaintiff reenlistment in the past, plaintiff would not have lost the opportunities for civilian employment that would have brought him to a point of equivalent achievement.

"The injury to plaintiff from having relied on the Army's approval of his military career — and being denied it now — is the loss of his career.'

Watkins v. United States Army, 551 F. Supp. at 223.

there be no harm to the military, but, in fact, that the Army would benefit by the continued service of a proven,

> outstanding professional soldier. The harm to the public interest if reenlistment is not prevented is nonexistent. Plaintiff has demonstrated that he is an excellent soldier. His contribution to this Nation's security is of obvious benefit to the public.

Watkins v. United States Army, 551 F.Supp. at 223.

The Army reenlisted Watkins for a six year term on November 1, 1982, with the proviso that the reenlistment would be voided if the District Court's injunction were not upheld on appeal. While the Army's appeal of the District Court's injunction was pending, Watkins continued to render superior service to his country as a sergeant in the United States Army. As noted by the *en banc* Court below:

> While the Army's appeal of the district court injunction was pending, the Army rated Watkins' performance and professionalism. He received 85 out of 85 possible points. His ratings included perfect scores for "Earns respect," "Integrity," "Loyalty," "Moral Courage," "Self-discipline," "Military Appearance," "Demonstrates Initiative," "Performs under pressure," "Attains results," "Displays sound judgment," "Communicates effectively," "Develops subordinates," "Demonstrates technical skills," and "Physical fitness." His military evaluators unanimously recommended that he be promoted ahead of his peers. The Army's written evaluation of Watkins' performance and potential stated:
>
> SSG Watkins is without exception, one of the finest Personnel Action Center Supervisors I have encountered. Through his diligent efforts, the Battalion Personnel Action Center achieved a near perfect processing rate for SIPDERS transactions. During this training period, SSG Watkins has been totally reliable and a wealth of knowledge. He requires no supervision, and with his "can do" attitude, always exceeds the requirements and demands

placed upon him. I would gladly welcome another opportunity to serve with him, and firmly believe that he will be an asset to any unit to which he is assigned.

SSG Watkins should be selected to attend ANCOC and placed in a Platoon Sergeant position. [Rater's Evaluation of Watkins' performance and potential.]

Watkins III, 875 F.2d at 703-704.

In 1983 a panel of the Ninth Circuit reversed the District Court's decision in *Watkins I*. Shortly thereafter Watkins was discharged from the Army, ending his exemplary 15 year military career. [3]

REASONS FOR DENYING THE WRIT

1. The Issue Presented In Question No. 1 Was Not Raised Below, Nor Does The Opinion Below Conflict With Any Other Circuit Court Opinions.

In its petition the Army's first question presented is, "Whether the federal government may ever be estopped from applying one of its valid regulations?" The Solicitor General further noted that in the case of *OPM v. Richmond*, No. 88-1943 he had "urged the Court to hold that the government may never be estopped from applying valid legal rules." (Petition for Certiorari, at 12-13).

While the Solicitor General did take that position in *Richmond*, in the present case the United States Army *never*

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[3] On May 3, 1989 the Ninth Circuit *en banc* panel reinstated the District Court's 1982 decision in favor of Watkins. In January of 1990 the Ninth Circuit denied the Army's petition for rehearing. Despite the fact that the decision of the *en banc* Court affirms the six year reenlistment contract which Watkins executed in 1982, and the fact that Watkins was only permitted to serve roughly 1½ years on this contract before being discharged in 1984, the Army has refused to permit Watkins to resume active duty.

made such an argument. In *Watkins I*, the Army did not challenge established Ninth Circuit precedent which held that under some circumstances the federal government could be equitably estopped from applying statutes or regulations. [4] Instead, the Army limited its argument to (1) the narrower contention that an equitable estoppel claim raised against the military branch of the federal government was nonjusticiable; and (2) the factual contention that even assuming an equitable estoppel claim against the military was justiciable, that the District Court's finding that the Army was guilty of affirmative misconduct was not supported by the record. [5]

In *Watkins III* the Army also failed to raise the broader claim that the federal government could never be estopped from enforcing an otherwise valid regulation. After the Ninth Circuit granted rehearing *en banc* and vacated the panel decision in *Watkins II*, Watkins filed a supplemental brief in which he explicitly asked the Ninth Circuit to overrule *Watkins I* and to hold that equitable estoppel claims raised against the

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[4] *See United States v. Lazy FC Ranch*, 481 F.2d 985, 988 (9th Cir. 1973) ("the estoppel doctrine is applicable to the United States where justice and fair play require it"); *Johnson v. Williford*, 682 F.2d 868, 871 (9th Cir. 1982); *United States v. Ruby Co.*, 588 F.2d 697, 702 (9th Cir. 1978), *cert. denied*, 442 U.S. 917 (1979); *United States v. Wharton*, 514 F.2d 406, 410 (9th Cir. 1975); *Brandt v. Hickel*, 427 F.2d 53, 56–57 (9th Cir. 1970); *United States v. Georgia Pacific Co.*, 421 F.2d 92, 103 (9th Cir. 1970); *Schuster v. Commissioner*, 312 F.2d 311 (9th Cir. 1962).

[5] In *Watkins I* the Army's opening brief on appeal set forth the following two "Questions Presented":

"1. Whether a claim that the Army is equitably estopped from applying relevant Army regulations governing reenlistment qualifications is subject to judicial review?

"2. Assuming *arguendo* that review is available, whether the Army may be estopped from considering plaintiff's reenlistment application under valid regulations which make homosexuality a nonwaivable bar to reenlistment."

(Brief of Appellant at p. 1, Ninth Circuit No. 82-3681).

military were justiciable.[6] The Army filed a response in which it urged the *en banc* Court to adhere to *Watkins I*, contending that *Watkins I* correctly held that equitable estoppel claims were nonjustiable when raised against the military branch of government. At no point did the Army ever argue the broader proposition that the federal government could never be estopped.[7]

The Solicitor General now attempts to raise this issue for the first time in this Court. When a party has failed to raise an issue in the Court of Appeals, absent exceptional circumstances this Court has repeatedly held that it will not grant certiorari to address the issue. *Berkemer v. McCarty*, 468 U.S. 420, 443 (1984); *Kosak v. United States*, 465 U.S. 848, 850, n.3. (1984) ("[b]ecause petitioner did not present this argument to the Court of Appeals we decline to address it"); *Delta Airlines v. August*, 450 U.S. 346, 362 (1981) ("that question was not raised in the Court of Appeals and is not properly before us"); *United States v. Lovasco*, 431 U.S. 783, 788, n.7 (1977).

There are no exceptional circumstances in this case which would excuse the Army's failure to raise the issue stated in the first question presented in the courts below. Moreover, neither this Court nor any Circuit Court has ever held that under no circumstances may the federal government ever be estopped. Therefore, this Court should deny the petition for certiorari.

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[6] Ninth Circuit No. 85-4006, Appellant's Suppplemental Brief for Rehearing *En Banc*, at pp. 1-19.

[7] See Ninth Circuit No. 85-4006, Appellees' Response to Appellant's Supplemental Brief for Rehearing *En Banc*, at pp. 5-12.

2. This Court's Recent Decision In *Office Of Personnel Management v. Richmond* Has No Bearing Upon The Decision Issued Below.

In his certiorari petition the Solicitor General noted that a decision in *OPM v. Richmond*, No. 88-1943, could be anticipated in the near future. He maintained that "[b]ecause this Court's opinion in *Richmond* will likely shed light on the correctness of the Ninth Circuit's decision [in *Watkins III*], this petition should be held and disposed of in light of *Richmond*." (Cert. Petition at p. 13).

On June 11, 1990, this Court issued its decision in *OPM v. Richmond*. It is now evident that the *Richmond* decision does not shed any light at all on the issues raised by the Army in this case. The Army anticipated that this Court would use *Richmond* as a vehicle for deciding the broad question of whether or not the federal government may ever be estopped from enforcing a statute or regulation. However, this Court studiously avoided deciding that question.

> A narrower ground of decision is sufficient to address the type of suit presented here, a claim for payment of money from the Public Treasury contrary to a statutory appropriation.

Richmond, Supreme Court No. 88-1943, Slip Opinion, 9).

Since the present case does not involve a claim for payment of money contrary to statutory appropriation, the holding in *Richmond* has no impact upon the decision below. *Watkins III* does not involve a suit by a claimant seeking public funds in violation of an appropriations statute; consequently, *Richmond* is simply not controlling. Since *Richmond* in no way calls into question the soundness of the decision below, the Army's suggestion that this Court should grant certiorari and dispose of this case in light of *Richmond* has no merit.

Nor is there any reason to grant certiorari in order to decide the question which *Richmond* deliberately did not

decide, of whether the Government may be estopped under other circumstances. The separate opinions of five members of this Court strongly imply that equitable estoppel claims against the government should be decided on a case by case basis. *Richmond*, White & Blackman, JJ., concurring, Slip Opinion at 1. ("[T]he Court wisely does not decide that the Government may not be estopped under any circumstances."); Stevens, J., concurring, Slip Opinion at 2 ("This case . . . does not involve such extreme facts."); Marshall & Brennan, JJ., dissenting.

3. The Appellate Court's Determination That The Military Can Be Estopped in Certain Circumstances Does Not Conflict With Any Prior Decision Of This Court. Nor Is There Any Conflict Between The Decision Below And Decisions Of Other Circuits.

The Army erroneously contends that the decision below is in conflict with prior decisions of this Court. None of the decisions cited by petitioner, however, contain any holding whatsoever regarding a claim of equitable estoppel. Moreover all three decisions cited by petitioner involved claims for the payment of money from the public treasury. [8] Thus these cases

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[8] *Sutton v. United States*, 256 U.S. 575 (1921) held that a contractor could not sue the military for payment of more than the $20,000 sum appropriated by Congress for improvement of a navigable waterway dredged by the contractor.

Filor v. United States, 76 U.S. (9 Wall.) 45 (1870) held that a landowner could not sue in the Court of Claims for nonpayment of $30,000 rent supposedly owed to him under a lease executed by Army officers, because Congress had not authorized the officers to spend any money for the lease of the claimant's premises.

Gibbons v. United States, 75 U.S. (8 Wall.) 269 (1869) simply holds that when a seller enters into a contract with the United States because an officer of the United States coerced him into the agreement by threatening to arrest him, that the United States is not obligated to pay damages for the tortious conduct of its officer, and that the seller is limited to recovery of the contract price he agreed upon.

are entirely consistent with the Court's recent decision in *Richmond*, and are in no way apposite to the case at bar.

Nor is the decision below in conflict with any decision from any other Circuit Court of Appeals. None of the cases cited by the Army involved equitable estoppel claims raised against the military.[9] Moreover, a number of Ninth Circuit decisions address the merits of equitable estoppel claims raised against the military, negating any contention that such claims are not justiciable. *Cortese v. United States*, 782 F.2d 845 (9th Cir. 1986); *Jablon v. United States*, 657 F.2d 1064 (9th Cir. 1981); *Lavin v. Marsh*, 644 F.2d 1378 (9th Cir. 1981). In *Cortese*, then Judge Kennedy went directly to the merits of an equitable estoppel claim raised against the military, thus refuting the Army's contention that such claims are not justiciable:

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[9] *Costner v. Oklahoma Army National Guard*, 833 F.2d 905 (10th Cir. 1987) and *Nieszner v. Mark*, 684 F.2d 562 (8th Cir. 1982), *cert. denied*, 460 U.S. 1022 (1983) both involved suits for violation of the Age Discrimination in Employment Act, 29 U.S.C. Section 621, *et seq.*

Stinson v. Hornsby, 821 F.2d 1537 (11th Cir. 1987) *cert. denied* 109 S. Ct. 402 (1988) involved a claim for racial discrimination made pursuant to Title VII, 42 U.S.C. Sections 2000e–2000e–17, where the Court remanded the case to the District Court for application of the justiciability test of *Mindes v. Seaman*, 453 F.2d 197 (5th Cir. 1971).

Williams v. Wilson, 762 F.2d 357 (4th Cir. 1985) was a suit for injunctive relief where the plaintiff contended that the National Guard had violated its own regulation. The claim was held nonjusticiable solely upon the ground that the plaintiff had failed to exhaust available intraservice administrative remedies.

In *Penagaricano v. Lienza*, 747 F.2d 55 (1st Cir. 1984) the court's nonjusticiability holding was based solely on failure to exhaust intraservice administrative remedies.

Mindes v. Seaman, 453 F.2d 197 (5th Cir. 1971) involved a due process challenge to an adverse Officer Effectiveness Report which led to a transfer from active duty to reserve status. The Circuit Court did not decide the merits of the justiciability question.

> We begin by considering Great American's claim that the conduct of the Marine Corps equitably estops the United States. . .

Cortese, 782 F.2d at 848.

Similarly, a number of District Court decisions have expressly held that the military may be equitably estopped in suits brought by service members. For example, in *Santos v. Franklin*, 493 F. Supp. 847, 852 (E.D. Penn. 1980) the District Court, like the Ninth Circuit in the case at bar, expressly held that the broader constitutional claims raised by the service member would not be addressed because the case could be resolved in favor of the service member on equitable estoppel grounds. *See also Liquori v. Alexander*, 495 F. Supp. 641 (S.D.N.Y. 1980); *Powell v. Marsh*, 560 F.Supp. 636 (D.D.C. 1983).

Since the decision below does not conflict with any past decisions either of this Court or of other Circuit Courts of Appeals, the Army's petition for certiorari should be denied.

4. The Issue of Affirmative Misconduct Is A Factual Issue Of Interest Only To The Army And Watkins, And Not Worthy of Review By This Court.

The Army has never directly challenged the factual findings made by the District Court. These findings are binding on appeal unless they are "clearly erroneous." Fed. R. Civ. P. 52(a). The Army's sole contention is that the undisputed factual findings of the District Court do not suffice to establish the element of affirmative misconduct. The determination of whether the facts of this case suffice to establish "affirmative misconduct" is hardly an issue of broad public importance worthy of this Court's attention.

The facts of this case are unique. It is extremely unlikely that there is even one other American military service member anywhere on this planet who can lay claim (1) to having led

an outstanding military career for 15 years; (2) to having survived a prior administrative discharge proceeding with a unanimous finding of a board of officers that his sexual orientation does not adversely affect the quality of his service or the morale of his unit; (3) to having obtained a SECRET security clearance and a position at a NATO nuclear weapons site in Europe; (4) while all the while candidly acknowledging, right from the very start, his or her homosexuality. Nor is there likely to be another case where the military consciously reenlisted a homosexual service member on three separate occasions. Indeed the Army was so painfully aware of how this fact undermined its position in Court, that it undertook to forge Waktins' reenlistment records in an attempt to falsely document a history of Army objections to Watkins' reenlistment.[10]

Given the overwhelming probability that no other homosexual soldier in the armed forces could ever make a similar claim that the Army was estopped to deny him reenlistment on grounds of homosexuality, there is no reason for this Court to grant certiorari in this case.

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[10] Watkins presented unrebutted proof that a false entry dated July 29, 1981 was made on his reenlistment data card. The entry was supposedly made by Captain Rodger D. Scott following an interview with Watkins. Watkins gave unrebutted testimony that the interview never occurred. An earlier entry had been erased, but was still legible. That earlier entry stated that Watkins was eligible for reenlistment. Watkins' testimony was corroborated by Sergeant Michael Austin. In October of 1981 Captain Scott testified under oath that he was not even aware that Watkins was a homosexual until September of 1981. This contradicted the forged entry which appeared to document ineligibility for reenlistment due to homosexuality. Captain Scott never rebutted Watkins' and Austin's testimony that the July 29, 1981 reenlistment data card entry was a forgery. CR 58, 59.

5. Even If The Court Believed That the Decision Below, Premised Upon Equitable Estoppel Grounds, Was Incorrect, There Are Several Other Grounds Upon Which Watkins Should Prevail. A Reversal Of The Equitable Estoppel Ground Would Require A Remand To The Ninth Circuit *En Banc* Panel, For Consideration Of Several Broad Constitutional Claims.

As the Ninth Circuit *en banc* opinion expressly recognized, the effect of holding Watkins' equitable estoppel claim to be justiciable was to permit the Court to avoid deciding several constitutional claims which would have a far more intrusive effect upon the military department. *Watkins III*, 875 F.2d at 706. By ruling for Watkins on equitable estoppel grounds, the *en banc* Court was able to avoid the equal protection issue upon which the *Waktins II* majority premised its decision in favor of Watkins.

Assuming, *arguendo*, that this Court concluded that the decision below was erroneous, this case would then have to be remanded for further consideration of all of the remaining constitutional and statutory claims which were left undecided by the *en banc* Court of Appeals. In addition to Watkins' equal protection claims, [11] this would necessitate *en banc* consideration of his claims that the denial of reenlistment in his case violates the Administrative Procedures Act. The Third Circuit has expressly held that denial of reenlistment to a homosexual service member is reviewable under the APA. *Neal v. Secretary of the Navy*, 639 F.2d 1029 (3rd Cir. 1981). And this Court itself has expressly held that even where a litigant cannot satisfy all the elements of a common law equitable estoppel claim, he still may have a valid claim that the government has violated the APA. *Lyng v. Payne*, 476 U.S. 926 (1986).

[11] In the Court below Watkins contended that the Army regulation at issue violates the equal protection component of the Fifth Amendment Due Process Clause, regardless of whether the Court applies strict scrutiny, middle tier scrutiny, or the minimum rationality test of *Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985).

Watkins also raised claims that application of the Army's reenlistment regulation to him, under the particular facts of his case, violates the due process entrapment doctine of *Raley v. Ohio*, 360 U.S. 423 (1959), the Petition Clause of the First Amendment, and the Free Speech Clause of the First Amendment. All of these claims would have to be reargued and decided by the *en banc* Court below, if this Court were to grant certiorari and reverse the equitable estoppel holding. Given the very protracted length of this litigation (which has been going on now for nine years), and the fact that any decision here is unlikely to have any impact on any soldier other than Watkins, respondent submits that it would be an unwarranted burden upon him and upon the Ninth Circuit to require the parties to continue this litigation by obtaining a *fourth* decision from the Ninth Circuit.

CONCLUSION

The Army has waived the right to ask this Court to decide the issue stated in Question Presented No. 1. The recent decision in *OPM v. Richmond* has no impact on this case whatsoever. The decision below is not in conflict with any prior decisions of this Court or of other circuit courts. The case is factually unique and the decision is completely dependent upon those unique facts, making the decision of no importance to anyone except respondent Watkins. And finally, there are several other grounds besides equitable estoppel upon which the judgment in favor of Sergeant Watkins can be affirmed.

For all of these reasons, the petition for certiorari should be denied.

Respectfully submitted this 10th day of July, 1990.

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